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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
)

Application by Ameritech Michigan)
Pursuant to Section 271 of the Communications)
Act of 1934 to Provide In-Region, InterLATA)
Services in Michigan)
)
_____)

97-137
CC Docket No. Xx-xxx

COMMENTS OF THE
COMPETITION POLICY INSTITUTE

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INTRODUCTION

The Competition Policy Institute (CPI) respectfully submits these initial comments on the Application by Ameritech Michigan to provide in-region, interLATA services in Michigan. CPI is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers.

These comments focus on the public interest standard. Although questions have been raised concerning Ameritech's compliance with the competitive checklist and the other requirements of section 271, CPI does not comment on these requirements at this time.

Although the public interest test allows the FCC to consider all relevant factors to determine whether consumers will benefit from the entry of the RBOC into the interLATA market, CPI believes that the Commission should give primary importance to whether consumers in the state have a realistic choice for local telephone service. The Commission should treat the evidence of consumer choice much as it treats the opinions of the Department of Justice -- the Commission should give it "substantial weight". Ameritech's Application does not provide sufficient evidence that consumers in Michigan have a realistic choice for local telephone service. Since, the other public interest factors do not overcome the lack of this evidence, the Ameritech Application does not satisfy the public interest test at this time.

The comments are divided into two sections. The first section will discuss the reasons why the Commission should consider whether the consumers have a realistic choice for local telephone service as a significant part, but not the only part, of its public interest analysis. The second section will discuss the lack of evidence in the Ameritech Application to demonstrate that it satisfies the public interest test.

I. DETERMINING WHETHER CONSUMERS HAVE A REALISTIC CHOICE FOR LOCAL TELEPHONE SERVICE SHOULD PLAY A SIGNIFICANT ROLE IN THE FCC'S PUBLIC INTEREST ANALYSIS.

The public interest standard offers the opportunity for the FCC to exercise its independent judgment of the merits of the Ameritech application. While the FCC's public interest analysis is not without limits, the purpose of the public interest analysis is to ensure that applications to enter the long distance market satisfy the spirit of the legislation as well as the technical details. As CPI has stated in its comments on the SBC application to provide interLATA service in Oklahoma, the public interest test allows the FCC to use its common sense to determine whether consumers will be better off if the application is approved or denied.

In describing the FCC's role in enforcing the public interest test, it is easier to describe what the public interest test is not. First, the public interest test cannot be used to expand the checklist. Section 271(d)(4) provides that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)". In other words, the FCC cannot require the RBOC to unbundle an additional item that is not already included among the 14-point checklist as a precondition to interLATA entry.

Second, the legislative history demonstrates that the Commission may not use a market share test to determine whether RBOC entry should be granted. The Commission cannot, for instance, require the RBOCs to show that it has lost 10% of its local telephone business to competitors before it can be allowed into the interLATA market. Congress considered and rejected amendments that would have required competitors to gain a 10% share of the local market, or required that competitors serve a substantial number of subscribers.

More generally, the FCC should not use the public interest test to establish any additional

threshold requirement that must be met as a precondition for RBOC entry. Congress enumerated the specific preconditions that must be met prior to RBOC entry into long distance. It is not the Commission's job to expand upon the list of necessary preconditions. The FCC cannot create additional factors that must be met prior to RBOC entry in the same way that the checklist must be met. The public interest test allows the Commission to consider several factors as part of its analysis, but none of those factors alone can be an absolute precondition that must be satisfied

At the same time, the public interest test must mean something or it would not have been included in the statute. CPI believes, for example, the public interest examination must allow the FCC to examine factors in addition to those already included in the set of preconditions established by Congress. If, in reviewing the application under the public interest test, the FCC does nothing more than to examine whether the RBOC has met the checklist, has satisfied the requirements of Track A or Track B, and has indicated its intention to satisfy the separate subsidiary requirements of section 272, the Commission will have stripped the public interest test of any meaning at all.

CPI believes that the purpose of the public interest test is to allow the Commission to consider all the factors that determine whether consumers would benefit from RBOC entry into the interLATA market. The Commission should not limit itself to considering any one factor as a necessary prerequisite that alone determines whether the RBOC application should be granted. In its public interest review, the FCC must examine the RBOC's compliance with the preconditions specifically set forth in the Act and any other factor that is relevant to the issue.

For example, some of the factors that the FCC should examine include: whether the RBOC's entry into long distance would lead to reduced prices for long distance service; whether

the RBOC's entry would increase its ability and incentives to discriminate against long distance companies because of its ownership of local exchange facilities; whether the RBOC has engaged in any illegal or discriminatory behavior; the extent and level of local telephone competition in the State; whether the RBOC's entry would allow consumers to engage in one-stop-shopping for all their telecommunications services; and actions by cities, state legislatures, or regulatory commissions to impede entry by competitors for local telephone service.

CPI submits that, while all these factors are important, the most important factor the Commission should examine is whether consumers in the state have a realistic choice for local telephone service. If consumers have a realistic choice for local telephone service, many of the other factors that affect the benefits or disadvantages of RBOC entry will naturally follow. For instance, if consumers have a realistic choice for local telephone service, the RBOC will have much less incentive and ability to discriminate against long distance companies because long distance companies will have an alternative means of reaching the local customer. If consumers have a realistic choice for local telephone service, that will indicate that the RBOC is not discriminating against the local service competitor for access and interconnection to the RBOC's network. If consumers have a realistic choice for local telephone service, entry of the RBOC into the interLATA market is more likely to produce benefits to consumers because the RBOC will have greater market incentives to pass any savings it achieves through efficiencies to consumers in the form of lower rates. Finally, if consumers have a realistic choice for local telephone service, that will provide the best evidence that the market for local telephone service is truly open to competitive entry.

An additional benefit of examining whether consumers have a realistic choice for local

telephone service is that it saves the Commission the time and energy of examining all the factors that determine whether a market is truly open to competition. For example, for the Commission to determine whether a market is “irreversibly opened” to competition, as suggested by the Department of Justice, the FCC would have to examine, among others, the following factors: whether the RBOC has satisfied the 14-point checklist; whether the RBOC has taken action outside of the checklist, such as locking customers into long-term contracts with excessive termination penalties, to prevent competitive entry; whether municipal governments have imposed taxes or other discriminatory regulations on telecommunications providers; whether landlords of multiple dwelling units have allowed competitors to obtain access to their buildings without requiring huge commissions; whether state legislation has imposed discriminatory terms (such as build-out requirements (Texas) or limitations on eligibility for universal service funding actions (Arkansas)) on competitors; whether the RBOC has attempted to impose “PIC-freezes” on the ability of consumers to switch to a different local or long distance provider; whether intraLATA toll dialing parity is being provided (in those states that are permitted to order dialing parity under the Telecommunications Act), and many others. Gathering the data to evaluate each of these factors is certain to be difficult, especially within the 90-day time frame in which the Commission must rule on each application.

Further, under the DOJ’s proposal, the Commission’s job would not end there. To determine whether a market is “irreversibly opened” to competition, the Commission must not only examine each of these factors, the Commission must also evaluate the importance of each factor on the ability of local competitors to enter that market. For instance, the receptiveness of building owners to competitive entrants is likely to be more significant in New York than in

Wyoming. Actions by cities to impede entry may be more important where state governments have delegated authority over telecommunications issues to them than in states where regulatory authority is retained by the State.

In short, determining whether consumers in a state have a realistic choice for local telephone service would be much easier than evaluating the multitude of factors that affect whether a market is irreversibly opened to competition.

Some may argue that examining whether consumers have a realistic choice for local telephone service is the type of market share analysis that was specifically rejected by Congress. Congress rejected approaches that would have set a specific threshold for competition (such as a 10% market share test or a “substantial” number of subscribers) as a precondition of entry. Congress did not prevent the Commission from examining whether consumers have a choice for local telephone service as part of its public interest analysis.

CPI does not advocate that whether consumers have a realistic choice for local service should be the only factor that affects the FCC’s public interest analysis. Rather, CPI suggests that the consumer choice approach should be the most important of the factors considered by the Commission. CPI’s suggestion is similar to the statute’s requirement that the Commission must give substantial weight to the opinion of the Department of Justice. The Commission may override the advice of the DOJ, but only with especially strong reasons. Similarly, the Commission could find that the RBOC satisfies the public interest test even if consumers do not have a realistic choice for local service, but only if the other factors affecting the public interest analysis in the RBOC’s favor are especially strong.

The Commission can examine the state of local competition from a consumer perspective

consistent with Congressional intent.¹ The Commission should examine whether consumers have a choice for local telephone service in several parts of the state, or only in one location in that state. The Commission should examine whether large and small business customers have a choice for local service, or only large business customers. The Commission should examine whether both urban and rural residential consumers have a choice or whether only urban consumers have such a choice. The Commission should examine whether high and low-income persons have an alternative provider of local service, or whether only high-income residents have such a choice.

The Commission would run afoul of Congressional intent if it established a threshold number or amount of consumers that must have a realistic choice as a precondition to satisfying the public interest test. The Commission can, however, examine the entire state to determine whether, and to what extent, consumers have a choice of alternative providers. Clearly, two consumers in a state (one business and one residential) having a competitive alternative would not be enough; requiring every consumer in the state to have a competitive alternative available would require too much. In fact, CPI shares the view of the Department of Justice that the

¹In fact, the legislation supports examining the local market to determine whether that market is “open”. The oft-quoted phrase in the first sentence of the Conference Report states that the purpose of the legislation is to accelerate rapidly the deployment of telecommunications services “by opening all telecommunications markets to competition.” This stated purpose does not require that all companies must be able to provide all services; the goal is to open markets that were previously closed to competition. The long distance market, the equipment market, and the international market were already open at the time of passage of the legislation. The only market closed to competition at the time of passage of the Act was the local telephone market. By stating as its goal the opening of all markets to competition, the Conference Report supports the notion that the FCC should examine the openness of the local telephone market as a part of its decision on each RBOC application to provide interLATA service. CPI submits that determining whether consumers have a realistic choice for local telephone service is not the only way, but is the best way, to determine whether the local market is truly open.

RBOC can satisfy the public interest standard even if it retains market power over local telephone service in at least some portions of the state.

Furthermore, the realistic choice approach does not require that consumers actually subscribe to a competitive provider of local telephone service. It only requires that consumers be able to choose an alternative provider of local service. On the other hand, consumers do not have a realistic choice unless competitors are actually taking orders and providing service in the market. In other words, it is not enough if a competitor is authorized to provide service and has built facilities or ordered access and interconnection. Competitors must be operational, and consumers must be able to subscribe to competitors at the time the RBOC application is filed.

To summarize, in determining whether an RBOC has satisfied the public interest test, the FCC should examine all relevant factors for determining whether approval of the RBOC's application would benefit consumers. One of the most important factors is whether consumers have a realistic choice for local telephone service from an alternative provider. If consumers in a state have such a choice, then many of the benefits of interLATA entry by an RBOC will automatically flow to consumers. The FCC must not establish an arbitrary threshold level of competition that determines whether the RBOC satisfies the public interest test. The public interest test requires that the FCC must exercise its judgment in reviewing the evidence and avoid any "bright line" tests. The FCC should, however, examine the market to determine whether different types of consumers have a realistic choice, from an operational provider, for local telephone service. This examination of the market will provide significant evidence toward the FCC's public interest inquiry.

II. AMERITECH'S APPLICATION FAILS TO PROVIDE SUFFICIENT EVIDENCE TO DETERMINE WHETHER MICHIGAN CONSUMERS HAVE A REALISTIC CHOICE FOR LOCAL TELEPHONE SERVICE.

Ameritech is to be commended for addressing the issue of local competition as part of its public interest analysis. As opposed to some RBOCs² who have avoided any discussion of local competition as part of the public interest analysis, Ameritech concedes that one of the goals of the 1996 Act is to "open local exchange service to competition." (Ameritech Application, p. 66) Further, Ameritech's discussion of the progress made by competitors to enter the local telephone market in Michigan in its public interest analysis is an acknowledgement that local competition is a part of the Commission's public interest inquiry.

Unfortunately, Ameritech's assessment of the growth of local competition does not show that consumers in Michigan have a realistic choice of alternative local telephone providers. While Ameritech refers frequently to the interconnection agreements it has reached, the facilities deployed by potential competitors, the number of competitors certified to compete, Ameritech provides little evidence of whether consumers currently can subscribe to an alternative local telephone provider. The Commission should not approve an application unless the FCC is satisfied that significant numbers and types of consumers have a realistic choice of telephone providers.

Ameritech makes a number of claims that competitors "are offering" service, are "providing service", or are "entering the local exchange business in Michigan" (p. 78) The Ameritech Brief, however, fails to provide specific information concerning these carriers'

²See, Comments of BellSouth in Support of the Application by SBC to Provide In-Region InterLATA service in Oklahoma, in which BellSouth argued that, absent extraordinary circumstances, Bell Company interLATA entry will always satisfy the public interest test.

operations and customers. CPI is not convinced that these general statements alone prove that consumers can actually receive telephone service from competitors at the current time.

For instance, Ameritech states that AT&T “began offering local service in Michigan in mid-March of this year” but does not describe the markets AT&T has entered, the number of its subscribers, or the type of service being offered. Instead, Ameritech quotes from Chairman Robert Allen’s statements of his plans to provide local service in the future. AT&T “is building a wireless network” to provide local service in 1997, but it is not, apparently, providing service over that network today. AT&T has signed an agreement with TCG to provide local network access, but not local telephone service. AT&T has entered an agreement with Brooks Fiber that “will” enable AT&T to bypass Ameritech’s local network. None of these examples provide evidence that consumers today are subscribing to or can subscribe to AT&T for local telephone service.

Ameritech provides slightly more information when it describes MCI’s efforts. According to Ameritech, MCI provides local exchange service to business customers in Detroit. Ameritech then, however, discusses MCI’s business plans to provide local service to residential customers across the country and its efforts to provide a package of services under the “networkMCI One” brand. The most that Ameritech can say about Sprint is that it is “well-positioned” to compete, not that it is competing.

Ameritech states that Brooks Fiber, TCG, MFS and Winstar are “prominent” entrants into the Michigan local exchange services business, and three of these are providing “one-stop shopping” of local and long distance service. Ameritech does not provide any additional information concerning the number, type and geographic location of consumers who may choose

these providers as their local carrier.

The affidavit provided by Mssrs. Harris and Teeter provide greater information concerning each carrier's service operations and customers. The affidavit indicates, however, that the number of consumers who have a competitive alternative to them is extremely small compared to the number of Ameritech's customers in Michigan. For instance, the Harris-Teeter affidavit states that competitors have purchased approximately 21,321 unbundled loops from Ameritech as of March 1997 (Harris-Teeter Aff., p. 24). This amount is less than one-half of 1 percent of the total market in Michigan.

Mssrs. Harris and Teeter go on to argue that the number of consumers taking service from competitors has grown much higher in the last year. They point to the increasing number of disconnects, the increasing number of ported telephone numbers, and many other factors to demonstrate the growth of local competition. It is easy to show growth when the numbers start from almost nothing. The affidavit goes on to discuss factors that demonstrate the "addressable" market, the "potential" for competitors to attract new customers, and the capacity of new entrants to serve new customers. While this information is helpful, neither the affidavit nor the application show that consumers have a realistic choice for local telephone service.

The affidavit claims that four carriers are providing facilities-based service in Michigan -- MFS/Worldcom, TCG, MCIMetro, and Brooks Fiber -- to four cities -- Detroit, Grand Rapids, Ann Arbor, and Lansing. The affidavit states that Brooks Fiber has 20,297 lines in Grand Rapids alone. While this may appear to be a substantial number of consumers in that city, it is interesting to compare Brooks' number of lines in Grand Rapids with the total number of lines purchased by all competitors in the entire state of Michigan served by Ameritech -- 21,321. If

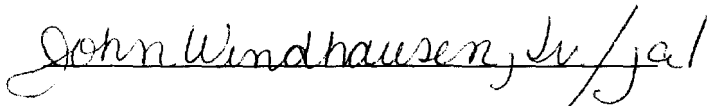
these numbers are comparable, it would indicate that 95% of the customers served by competitors in Michigan are served by one company in one city. The remaining 7.5 million consumers served by Ameritech in Michigan appear to have no realistic choice for local telephone service.³

³CPI believes that the number of actual subscribers of service from a competitor is a significant measure of the number of consumers who have a competitive service available to them. For instance, if we assume that the number of customers who have competitive service available to them is five times as high as the number of consumers who actually subscribe to a competitor, the number of consumers who can subscribe to a competitor would equal about 100,000. This figure still represents only about 1% of the 9.3 million consumers in Michigan.

CONCLUSION

In short, in order to assist the Commission in determining whether the public interest test is satisfied, Ameritech must provide much greater information to establish that consumers in Michigan have the ability to subscribe to an alternative carrier for local telephone service. Ameritech's Application has not provided sufficient evidence that the benefits of Ameritech's long distance entry would outweigh the lack of significant consumer choice for local telephone service. For this reason, CPI believes that Ameritech's Application does not satisfy the public interest test at this time.

Respectfully Submitted,



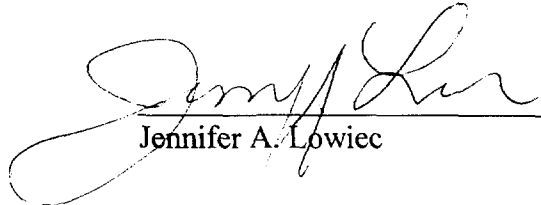
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CERTIFICATE OF SERVICE

I, Jennifer A. Lowiec, do hereby certify that the foregoing ,Comments of the Competition Policy Institute has been served June 10, 1997, to the parties of record.


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June 10, 1997

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